Schreiber Manufacturing Co., Inc. *and* Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America *and* Ricky Allen Flury, William Wade Mooney, Charles James Mooney, Gregory James Chalmers, William Joseph Davis, Richard Robenault, R. F. Farris, and Ernest A. Farris. Cases 7-CA-18007, 7-CA-18238, 7-CA-18259(1), 18259(2), 7-CA-18259(3), 7-CA-18405, 7-CA-18469(2), 7-CA-18928, 7-CA-18929, and 7-CA-19242

July 22, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 24, the Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, the General Counsel[1] and the Respondent filed exceptions and supporting briefs. The Respondent also filed an answering brief in support of the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Schreiber Manufacturing Co., Inc., Clawson, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Expunge from its files any reference to the discharge of Windle D. Pinkston, Sr., and Dennis J. Brewer on August 4, 1980, and notify them in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, or interfere with the protected concerted activities of employees, by discharging employees who have engaged in a strike and who are qualified for reinstatement to employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL offer to Windle D. Pinkston, Sr., and Dennis J. Brewer immediate reinstatement to their former job or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make each of them whole for any loss of earnings and benefits he may have suffered by reason of our discrimination against him, with interest.

WE WILL expunge from our files any references to the disciplinary discharge of Windle D. Pinkston, Sr., and Dennis J. Brewer, on August 4, 1980, and WE WILL notify them that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

SCHREIBER MANUFACTURING CO., INC.

[1] We hereby deny as lacking in merit the Respondent's motion to strike the General Counsel's exceptions.

[2] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

BERNARD RIES, Administrative Law Judge: This consolidated proceeding was heard in Detroit and Pontiac, Michigan, on 8 days in June, August, and October 1981. Interim settlements of various aspects of the several complaints have considerably reduced the issues to be decided.

The pleadings establish that it is appropriate for the Board to exercise jurisdiction over Respondent. While Respondent has refused to concede that the Union involved in this case, Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a "labor organization" within the meaning of Section 2(5) of the Act, the record leaves little doubt that the Union enjoys such a status; in any event, that question is relevant only to the technical issue of whether certain conduct by Respondent violated Section 8(a)(3), in addition to Section 8(a)(1), of the Act.[1]

Respondent has filed a brief; the General Counsel has not. On the basis of the entire record,[2] including my recollection of the demeanor of the witnesses, and after careful consideration of the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. THE SETTING

Respondent, which employs perhaps 90 or 100 employees working on two shifts, manufactures machinery and related products in Clawson, Michigan. On July 25, 1980, a labor dispute at Respondent's plant erupted into a walkout, and picketing ensued until August 4, 1980, when the employees returned to work. The Union got involved in the strike and circulated authorization cards, and thereafter filed a petition for election. While such an election was eventually held on March 26, 1981, the representation question apparently remains unresolved due to the existence of challenged ballots and election objections.

This case, as reduced by settlement, presently involves the propriety of the discharge of four employees and the validity of a no-access rule.

II. THE DISCHARGES OF PINKSTON AND BREWER

The complaint alleges that Respondent's refusal to reinstate Windle D. Pinkston, an employee with 7 years' tenure, and Dennis J. Brewer, a 2-month employee, at the conclusion of the strike on August 4, 1980, violated Section 8(a)(3) and (1) of the Act. For purposes of this case, the General Counsel concedes that both employees occupied the status of economic strikers.[3]

On August 4, both employees received the following mailgram from Respondent: "You are hereby suspended pending advisability of discharge arising from your acts of misconduct in connection with the picketing at Schreiber's including the throwing of rocks." Although the record does not discloses that the suspensions were ever formally converted into discharges, neither employee had been reinstated to employment at the time of the hearing.

The law protects strikers from employees who seek to discipline them in the belief, however, genuine, that they have engaged in misconduct in the course of the strike, when in fact they have not done so. In *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21, 23 (1964), the Supreme Court approved the following formulation:

> In sum, § 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

As set out in *General Telephone Company of Michigan*, 251 NLRB 737, 738–739 (1980), the Board has evolved the following procedure for applying the foregoing principles in the case of discharge economic strikers:

> The law is clear that when an employer disciplines an employee because he has engaged in an economic strike, such discipline violates Section 8(a)(3) and (1) of the Act. An employer may defend its action by showing that it had an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature. If the employer is able to establish such a defense, then the General Counsel must come forward with evidence that either the employee did not engage in the conduct asserted, or that such conduct was protected. The burden then shifts back to the employer to rebut such evidence.[10]

As indicated, the "honest belief" which the employer has to establish as a predicate for requiring the General Counsel to adduce proof of employee innocence must relate to "strike misconduct of a serious nature," *General Telephone Company, supra*. The Board and courts have uniformly held that "[N]ot every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act," *Cornet Casuals, Inc.*, 207 NLRB 304 (1973), and, as the Board stated in *General Telephone Company, supra*, "[T]he seriousness of each act of misconduct alleged must be analyzed and the cases of mere 'animal exuberance' differentiated from those in which the misconduct is so flagrant or egregious as to require subordination of the employee's protected rights in order to vindicate the broader interests of society as a

[1] Respondent put into evidence a copy of the Teamsters Local 299 newspaper, the contents of which strongly suggest that the Union is, in fact, a labor organization, and also introduced evidence of charges filed by it against the Union under Sec. 8(b) of the Act, which is applicable to "labor organizations." Respondent's brief does not argue that the Union is not a labor organization.

[2] Certain errors in the transcript are hereby noted and corrected.

[3] The complaint had alleged that Brewer was an unfair labor practice striker.

[10] *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952); *American Cyanamid Company, Inc.*, 239 NLRB 440 (1978). See, generally, *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964).

whole." On brief, Respondent acknowleges the principle that only those economic strikers "who engage in serious picket line misconduct" forfeit their right to reinstatement.

It is not enough, therefore, for an employer to assert its "honest belief" that a striker engaged in some sort of conduct which the employer thought to be disagreeable. If an employer states that he discharged a picketer because of an "honest belief" that the employee had dropped a toothpick on the plant premises, no obligation would devolve upon the General Counsel to disprove that allegation. I stated in *Bromine Division, Drug Research, Inc.*, 233 NLRB 253, 260 (1977), enfd. 621 F.2d 806 (6th Cir.), Judge Kennedy dissenting on this issue, "[I]n order for the burden to shift, the employer must prove a good-faith belief that the employee had engaged in conduct of sufficiently serious magnitude as would objectively disqualify him from the remedial rights ordinarily due him as an unfair labor practice striker."

On the morning of August 4, the last day of the strike, a rowdy group of 50 strikers was gathered at a gate to Respondent's premises. Two security guards hired by Respondent during the strike, Gerald Packman and John Williams, testified that at or about 9:30 a.m., as they patroled the parking lot adjacent to Respondent's office entrance, they saw Brewer and Pinkston, who were standing apart from the massed picketers, in quick succession throw some sort of missles in the direction of the office entrance from perhaps 40 yards away.[4]

Neither guard was able, at the hearing, to identify the nature of the objects thrown. Packman, however, said that, as he stood some 40 yards away from a Cadillac (owned by Respondent's vice president) parked in front of the offices, he "observed" the first object, thrown by Brewer, hit the Cadillac. He did not see the second object, thrown by Pinkston, strike anything, but he heard it make a "pinging sound, like it might have been a piece of metal or an object of a wheel cover or something like that." Williams gave similar testimony. In addition to the Cadillac parked directly in front of the offices, other automobiles were parked at a somewhat greater distance from the office entrance.

A few hours later, Williams and Packman made an inspection of the asphalt parking lot to search for the thrown objects. According to Williams, the only suspect item they found was an oversized ball bearing the sort used in the plant; this was discovered in the "area" of the Cadillac. On the advice of Packman, the police were called, but no arrests were made.

Under the case law summarized above, the first question to be answered is whether Respondent has established that it had "an honest belief that the employee disciplined was guilty of strike misconduct of a serious nature," *General Telephone Company, supra*. The record shows that Manufacturing Manager Steven L. Toth spoke to both guards about the incident soon after it occurred. Although neither guard was able at the hearing to identify the substances thrown by Pinkston and Brewer, it would appear that they told Toth that the missles were rocks. Both guards made affidavits about the incident; only Williams' affidavit is in evidence. Dated August 4, it states that Williams "observed" Pinkston "throw a rock and hit one of the cars" in the parking lot, and that he "saw" Brewer "throw a rock at and hit another vehicle." At the hearing, however, Williams testified that he did not "see" the object thrown by Brewer "hit anything," but he heard the "noise of it striking something . . . directly behind me." He gave similar testimony about the second throw: "I heard it . . . I did not see. I was watching them."

Manager Toth testified that guard Packman had told him that he had seen Brewer and Pinkston "throwing rocks or hard objects and that he had seen one of the company vehicles struck and had found damage, that another car had been hit but didn't know which one." I suspect that Toth's memory fails him in thus recalling a reference by Packman to "damage." Neither guard nor any other witness testified to discovering any damage to the Cadillac or any other vehicle; in a case as meticulously litigated as this one was, I cannot believe that, if some actual damage had been discovered, there would not have been extensive direct testimony on the subject. In addition, although Packman testified at the hearing that he saw or sensed two impacts, he also testified that he only told Toth that "there were incidents of rock throwing and that a *car* out in the parking lot, *one of the cars had been hit.*"

However apparently inaccurate the report given to Toth by Packman, as contrasted to the testimony of the guards at the hearing, it may be that the essence of the report—that "rocks" were thrown and that they struck a car or cars—satisfies the requirement that Respondent established an "honest belief of strike misconduct of a serious nature," thereby shifting the burden to the General Counsel to "come forward with evidence that either the employee did not engage in the conduct asserted, or that such conduct was protected." It could, on the other hand, be argued that the report was too sketchy a foundation for such an "honest belief," since it is possible that some rockthrowing, even when contact with cars is involved, may not amount to misconduct of a "serious nature." A pebble thrown underhanded, which rolls up to and nestles against a tire, is an example.

It appears to me, however, that it may be fairly said that, in the end, the evidence does not establish that the two employees engaged in conduct of a disqualifying kind.

The litigation of this issue did not hew to the neat procedural scheme envisioned by *General Telephone Company*. Instead of waiting for Respondent to establsh its honest belief of serious misconduct, counsel for the General Counsel called Pinkston and Brewer as witnesses in his case, and, reasonably responding to the message in the mailgrams they received, had them deny that they "threw any rocks" in connection with the picketing. On cross-examination, counsel for Respondent broadened the inquiry and elicited their denials to his questions about whether they had thrown any "hard objects" during the strike. Neither employee was particularly impressive, and

[4] Without detailing all the testimony on the subject, I am satisfied that the two guards, in subsequent consultation with Manufacturing Manager Toth, made an accurate identification of the two employees.

I preferred the testimony of the two guards they they had seen the employees launch something into the air.

The difficulty is that it is impossible to know what the employees threw, how hard they threw, and at what they were throwing. The guards were unable to identify the objects. An inspection of the asphalt parking lot 3 hours later turned up a single ball bearing and no other suspicious objects.[5]

Not every act of throwing during the heat of a strike is automatically disqualifying. In *Mosher Steel Company*, 226 NLRB 1163, 1168 (1968), the Board held that throwing a rock at a momentarily stopped truck with three occupants, where the rock hit the flatbed and caused no damage, was not conduct beyond the pale. In *MP Industries, Inc.*, 227 NLRB 1709, 1716 (1977), the discharge of a striker was held not justified despite the fact that, on two separate occasions, she threw a "pebble the size of a nickel" and a "stone" at the departing car of a nonstriker, and struck another car with an umbrella. In *Giddings & Lewis, Inc.*, 240 NLRB 441, 451 (1979), the Administrative Law Judge held that the "lobbing" of some "hand-sized" rocks over a fence, perhaps damaging an already battered parked car, by a "very intoxicated" striker, was insufficient.[6] In *Southern Florida Hotel & Motel Association*, 245 NLRB 561, 564 (1979) (Member Murphy dissenting), it was held "not sufficiently serious" when a striker threw a rock at a taxicab, apparently inflicting no damage. See also *American Cyanamid Company*, 239 NLRB 440, 442–443 (1978).

The circumstances here indicate that the objects propelled by the two employees were not large. No damage to any cars is indicated; it would seem that a ball bearing, thrown hard at a car, would have left its imprint. The sounds reported could have been made by pebbles. While Williams testified that he heard the sound of "metal against metal," his affidavit, referring only to "rocks," obviously contradicts that aural recollection. It seems probable that the discovery of the ball bearing influenced the memory of the guards as to the sounds accompanying the events.

There is no reason to believe that the missiles were aimed, from 40 yards away, to break the windows in the offices, or that there was any likelihood of their having done so. The circumstances do not suggest that missiles were aimed at the guards. Packman testified that neither object landed near him; Williams, who appears to have been standing about 20 yards from the offices, testified that the objects went over his head, thus suggesting that they were lofted, rather than thrown hard.

Thus, the record shows that some, possibly very small, objects were thrown, and does not show that they were thrown for any reason other than to chivy the guards. I hasten to go on record as being fervently opposed, in a strike or almost any other situation, to the hurling of any object which might reasonably be foreseen as threatening damage to person or property. The cases cited by Respondent[7] are all, I think, distinguishable from this one because the proven indicia of malicious intention and predictable danger in those cases are not present in this record. Here, given the absence of a showing of what was thrown, how hard it was thrown, and at what it was thrown, and the inferences to be drawn as to those issues from (a) the lack of physical damage, (b) the recovery from the parking lot of only one item of notable size (whose presence in the parking lot can in no persuasive way be attributed to Pinkston or Brewer), and (c) the distance involved, I cannot conclude that Pinkston or Brewer engaged in acts implicating wanton or willful disregard for person or property. On this evidence, I do not believe that Respondent was entitled to require these strikers to forfeit their jobs.[8]

There is an additional string to Respondent's bow with respect to Pinkston. Guard Williams testified that on August 1, while driving his car in escorting a truck through some pickets into the plant, the man he later came to know as Pinkston, from some 4–5 feet away, "picked up a solid object and threw it against the window of my car." Williams did not mention this incident to any official of Respondent until he was reporting the August 4 occurrence, when he told Manufacturing Manager Toth. Pinkston generally denied, as previously noted, having thrown any hard object during the strike.

Reliance on this item suffers from the same defect as earlier discussed. Williams at first carefully identified the missile as a "solid object"; he later referred to it as a "rock"; he then qualified his statement by saying that it was a "hard object" or a "solid object," and that he did not know whether it was a rock or not. He did say that it made a "loud noise" as it hit the bulletproof windshield of his car; for all we know, it may have been a piece of styrofoam. Williams did not say that the object landed on that portion of the windshield near the driver's seat, nor that his speed at the time of impact was such

[5] The evidence, which is quite clear on this point, simply provides no basis for Respondent's references in its brief to two ball bearings.

[6] Because the parties had agreed to a settlement of this portion of the case, the Board did not directly review the merits of this holding.

[7] *Alcan Cable West, A Division of Alcan Aluminum Corporation*, 214 NLRB 236, 247, 248 (1974) (throwing of rocks at administration building, breaking windows, held "additional disqualifying conduct"); *Ohio Power Company*, 216 NLRB 348, 349–350, 354 (1975) (slingshot fired from 20 feet which broke glass panel next to window of office where employee was sitting); *Bromine Division, Drug Research, Inc., supra*, 233 NLRB at 259 (breaking window in restroom with slingshot and propelling another rock through broken window after supervisor looked out of it); *Alkahn Silk Label Company*, 193 NLRB 167 (1971) (assorted violence, including the swinging of baseball bats and the throwing of rocks at moving vehicles); *Gold Kist, Inc.*, 245 NLRB 1095, 1103 (1979) (throwing rock at moving bus with passengers from distance of 2 feet); *Giddings & Lewis, Inc., supra*, 240 NLRB at 448–452 (throwing rocks at moving vehicles); *Georgia Kraft Company, Woodcraft Division*, 258 NLRB 908 (1981) (throwing rock at supervisor's moving vehicle passing through picket line).

[8] In conformity with the *General Telephone Company* procedure, it may be said that even if Respondent properly established an "honest belief" of serious misconduct, the General Counsel successfully, if prematurely, carried the burden of presenting "evidence that either the employee did not engage in the conduct asserted, or that such conduct was protected," by virtue of the testimony of Pinkston and Brewer. Even though I ultimately have discredited their denials of having thrown something, their uncontradicted evidence as of the conclusion of the General Counsel's case clearly shifted the burden "back to the employer to rebut such evidence." But in presenting the testimony of the guards for that purpose, Respondent failed to establish that the employees had engaged in serious strike misconduct, as discussed above.

that a distraction could have endangered him or bystanders.[9]

I conclude, therefore, that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Pinkston and Brewer on August 4, 1980.

III. THE DISCHARGE OF RICHARD ROBENAULT

Richard Robenault was discharged on February 6, 1981. The complaint alleges that the reasons for his termination were "his activity in circulating and presenting to the Employer an employee petition protesting the suspension of employee David Aylor" and his "sympathies for, and activities on behalf of, the Charging Union."

From the time he began employment in 1973 until he was discharged on February 6, 1981, Robenault had worked in the maintenance department. During the strike in July 1980, he had taken part in the picketing, and thereafter he openly wore a union hat and button at work, as did, the record shows, many of the employees. Robenault testified that, after the strike, company representatives held frequent meetings with the employees, and, at one such meeting in December 1980 or January 1981, Robenault had expressed his preference for union representation.[10]

Robenault further said that a few days prior to his discharge, as he passed Superintendent Sanzio Piacentini while walking through the shop, Piacentinin said, apparently referring to Robenault's display of union emblems, "You don't believe all that stuff is going to help you save your job." Although Piacentini was not called as a witness, Respondent brought out on cross-examination of Robenault that his pretrial affidavit, given on February 24, 1981, attributes to Piacentini the more innocuous and ambiguous remark, "Wearing all that stuff isn't going to do you any good." Despite Robenault's insistence at the hearing that Piacentini had referred expressly to his "job," I believe that his freshly recorded recollection only 3 weeks after the encounter is probably a more faithful version of the statement.

On February 6, a petition circulated among the employees asking Respondent to reconsider certain discipline meted out to an employee for engaging in a fight. Although he did not originate the petition, Robenault was the last to sign it (about 40 other employees also signed), and he handed the petition to Respondent's president, Karl Thiele, at or about 2 p.m., saying that he would "appreciate it if he would look it over and consider it." At quitting time that day, Piacentini gave Robenault a layoff slip.

The slip stated, "You are being permanently laid off because your position has been permanently abolished by consolidation with another position." When Robenault asked Piacentini how the plant could function without a maintenance employee, since he was the only one so engaged, Piacentini said that he could talk to higher management if he wished. Robenault went to see Manufacturing Manager Toth, who told him that Alexander Butterfield was returning to the maintenance shop and that no one else would be needed.

That Robenault, an employee with 8 years' service, handed in a petition at 2 p.m. and was in turn handed a permanent layoff slip 1-1/2 hours later is the kind of coincidence which often gives rise to unfair labor practice findings. Despite the exquisitely suspicious character of these circumstances, I conclude that Respondent's innocent explanation of the events should be accepted.

The record shows that Alexander Butterfield became supervisor of the maintenance shop in 1976, and from that time until September 1980, he and Robenault performed virtually all maintenance work in the plant.[11] Manager Toth testified that, in September 1980, Butterfield accepted the additional responsibility of supervising the machine department, replacing a supervisor who had left.

According to Toth, on January 30, Superintendent Piacentini told him that Butterfield had expressed a wish to once again limit his responsibilities to the maintenance department. Toth thereupon began a search for a new machine shop manager and, at 9 a.m. on Friday, February 6, hired one Dwayne Wesley for that position.[12] Toth testified to a management decision on February 4 by himself, President Thiele, and Vice President Ravis that, in transferring Butterfield back to full-time maintenance duty, it made no sense to retain Robenault, since the latter had demonstrated, in the 5 months in which he had worked alone in the maintenance department, that the work required only one employee. Toth further testified that it was company practice to withhold informing employees of a layoff until the last moment, to avoid the lack of productivity and destruction of morale engendered by such news. In addition, Toth said that Butterfield was a more valued employee than Robenault because of his capabilities in the area of complete machine teardown and repairing digital readouts.

The record shows that, by and large, Robenault and Butterfield were the only employees performing maintenance work prior to Butterfield's assumption of supervision of the machine shop. There was a helper whose duties included assisting with maintenance work, such as sweeping the floor, putting oil in the machines, and cleaning, but Toth did not regard him as strictly a maintenance employee. Another employee named Ward had been hired after September 1980 to do some sort of special maintenance work on the night shift about which Toth evinced uncertainty, but he had been released prior to February 6. The weight of the evidence, therefore, is that, between September and February, Robenault had, indeed, successfully performed virtually all of the plant maintenance work by himself.[13]

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[9] Williams testified that he and the truck were "trying to make our way through the crowd."

[10] Manager Toth said that he recalled no such statement by Robenault. In view of Robenault's notorious display of his sympathies, such an expression might have seemed superfluous.

[11] Although Robenault gave some rather confusing testimony on this subject, he seemed to have regarded Butterfield as his superior for most of this period. Another witness for the General Counsel, R. F. Farris, in being cross-examined about the July 1980 strike of which Butterfield had been an acknowledged leader, testified that he had understood Butterfield "to be the person in charge of the maintenance department."

[12] Notes on the hiring process made by Toth on February 5 and 6 are in evidence and corroborate his testimony. Wesley was to start work on Monday, February 9.

[13] Robenault testified that, at the time he was let go, he "was the only person in maintenance."

It therefore seems reasonable for Respondent to have concluded, in considering Butterfield's request to confine himself to maintenance work, that it was pointless to retain two men to do a job which one could perform. The reasons given for choosing Butterfield over Robenault are uncontradicted.[14] Also not controverted is Toth's testimony, given on October 27, 1981, that, since February 6, no new employees had been hired into the maintenance department.

It could be argued, of course, that the foregoing array of facts does not necessarily eliminate the possibility that Robenault was purged because he handed the petition to Respondent's president. One might speculate that if Respondent had tolerated for 4 years the employment of two men in a one-man job, the decision to change the situation sprang from hostile motivation. But equally convincing is the explanation stated by Toth that it was a case of neglect which was pinpointed by Robenault's demonstrated success at doing the job alone. Toth further said that business was in decline, which could also account for a closer look at such matters.

All things considered, I am not persuaded that the discharge of Robenault may be attributed to his activities on behalf of the Union or his involvement in the February 6 petition. Respondent's explanation of the discharge simply makes sense. Accordingly, I recommend that the allegation as to Robenault be dismissed.

IV. THE DISCHARGE OF R. F. FARRIS

The complaint alleges that the suspension of R. F. Farris on February 9, 1981, and his subsequent discharge were responsive to his membership in, sympathies for, and activities on behalf of the Union, and therfore violative of Section 8(a)(3) and (1).

Farris, who began employment with Respondent in January 1979, worked on the day shift in the machine department. After the strike, he testified, he wore a union hat and button at work, and he further "held meetings in the shop at noon and on the parking lot I talked to the employees" about the Union.

Farris gave uncontradicted testimony about some conversations with Superintendent Piacentini. On one occasion, in January 1981, the month in which a representation election was scheduled,[15] Piacentini asked Farris to explain his support for the Union effort; after he did so, Piacentini, citing Farris' influence, asked Farris to talk the employees out of voting for the Union, to which Farris replied, "Absolutely no way." Farris further told of an incident on the day before the scheduled January election in which Piacentini had tried to convince him that it made no "sense" to have a union. Farris replied that he had no time to talk about the matter, because they were on "company time." When Piacentini assured Farris that he could "talk to [him] here," Farris complied with Piacentini's insistence that he try to convince him that he would be benefited by union representation.

The event which led to Farris' discharge occurred on February 6, when Farris made a visit to the plant during the nigh shift. There is conflict in the testimony about the precise sequence of events here, and I am disinclined to give credence to the testimony of Farris. Although the initial testimonial impact he made was a good one, that impression had worn somewhat thin by the end of his appearance at the hearing. In addition, Farris' testimony was contradicted in some respects by employee Clayton Cobb, a witness for the General Counsel, and by Robert Haselhuhn, a night leader who testified for Respondent and whose evidene was convincingly presented.

Farris testified that, when he arrived home on February 6, he discovered that the battery on his second car needed charging, and his wife told him that she had called employee Cobb, a night-shift employee who resided nearby, to borrow his charger. Cobb had assertedly authorized Farris to go to his house and pick up the item, but Farris found Cobb's garage locked, and so proceeded to drive for 40 minutes to the plant to get Cobb's garage key.

Once there, Farris entered a side door of the plant, around 8 p.m. Farris testified that he walked about 3 feet into the plant; that he was seen by Cobb, who came "running up to the door, handed me the keys," "explained to me what to do . . . with the keys when I was finished with them," and then walked away; that there was only one other person present during his brief encounter with Cobb; that night leader Haselhuhn walked up and told him, "R.F., you have to leave," to which Farris said, "You are right, right. I am leaving"; and that he thereupon exited, having been in the plant for perhaps 3 minutes.[16]

Cobb, however, testified that he saw Farris as Cobb was on his way to the toolcrib, and asked him what had happened to Robenault earlier that day. Farris then asked for the key to Cobb's garage, which Cobb gave him.[17] By that time, "four or five other people" had gathered around, and when Cobb went about his business, some 3–4 minutes after first encountering Farris, they were still there. A couple of minutes later, leaving the toolcrib, Cobb saw Haselhuhn heading toward Farris, and he observed the two men speaking "for a minute or two." Cobb conceded that he "went back to work because there were already too many people gath-

[14] Furthermore, since Butterfield, although apparently a supervisor, had overtly led the July strike, there seems to have been no particular reason for Respondent to have favored him.

[15] The election was canceled by order of the Board, on January 29, upon a showing by Respondent that Butterfield's participation in the collection of authorization cards had tainted the showing of interest submitted by the Union with its representation petition. The Union thereafter filed a new petition on February 3, and an election was held on March 26.

[16] On cross-examination, Farris expanded his version of the conversation with Haselhuhn, saying that he jokingly told the latter that he would "leave before you call the police." This, as will be seen, adumbrated Haselhuhn's later account of the incident. Although Farris testified on cross-examination that Haselhuhn "did not repeat himself" in asking Farris to leave, he conceded, 50 pages later on recross, that Haselhuhn had "repeated the direction to [me] to leave more than once."

[17] Cobb appeared to contradict Farris' testimony that the latter's wife had talked to Cobb about borrowing the battery charger. At one point, Cobb answered negatively the question, "And you didn't know that he wanted your battery charger or your keys, did you?" and, at another pont, he replied, "no" to the question, "Before you came to work on the evening of February 6 and saw Mr. R.F. Farris did you have any idea that he wanted to borrow your battery charger?"

ered around Mr. Farris," and he estimated that Farris was present "at the high side 10 minutes."

Haselhuhn testified that, when the assembly leader notified him that Farris was in the plant, he took 3–4 minutes to shut down his machine and then walked over to Farris, around whom four other employees had gathered. When he told Farris that he would have to leave, Farris asked if Haselhuhn "was going to call the police." Haselhuhn reiterated that Farris had to go, and told the other employees to return to work; Farris again challenged, "Do you want to call the cops." Once more, Hasellhuhn ordered Farris to leave. The confrontation, which included a reference by Farris to "something about keys," took 7 or 8 minutes.

The following Monday, Haselhuhn reported the incident to Toth. On that day, Farris worked 4 hours and then went to see a doctor. That evening, he received a mailgram from Respondent, which stated:

> On February 6, 1981, you violated company rule by entering the plant work floor, when not scheduled, during the working hours of other employees. Dispite [sic] prior warnings you have failed to comply with the company rules accordingly you are suspended pending advisability of discharge. Should you desire to pick up your tools you must call for an appointment as will [sic] not be allowed on the premises unless you have an appointment.

On February 14, Farris received another mailgram advising him of his discharge, and asserting as the reason that, although he had been "repeatedly warned against disturbing other employees on their working time and disrupting production," he entered the plant on February 6 "when you were not scheduled and interfered with the work of employees during their working time."

Respondent's printed "Shop Policy," which is given to all new employees, recognizes three categories of "violations" according to gravity. The first group, which "may subject the employee to immediate discharge," includes such items as theft and fighting. The second group, which "may subject the employee to disciplinary action, ranging from written warnings to discharge, depending on the circumstances," includes such violations as refusal to obey orders and possession of weapons. The final category (rule 9) states that employees in violation thereof "shall first be given a verbal and then a written warning by the Company. Continued violations thereafter may subject the employee to disciplinary action, including discharge." Pertinent to the present inquiry is item (h): "Disturbing other employees on their jobs, so as to disrupt production."

Manager Toth testified that he made the decision to terminate Farris after his entry into the plant on February 6.[18] Toth testified to two prior violations by Farris of the rule prohibiting "Disturbing other employees." He said that on December 12, 1980, Superintendent Piacentini told him that Farris had "interrupted production of other employees," and that Toth had thereupon instructed Piacentini to issue a verbal warning. Respondent's Exhibit 19 is a printed "Verbal Warning Record" dated December 12, addressed to Farris and describing the offense as "Violation of Company Rule 9 h Disrupting Production." Toth testified that he wrote out the body of the exhibit, and it bears Piacentini's initial.

Respondent's Exhibit 20 is a "Written Warning" form, with Farris' name on it, dated January 9, 1981. The handwritten description of the conduct in violation of rule "9-H" reads, "Disturbing other employees on their jobs, so as to disrupt production." Toth testified that this form was prepared on the date shown, after Piacentini had told him that Farris had "disrupted production of our employees" and Toth had instructed Piacentini to "issue a written warning to Mr. Farris."

Farris was not recalled to testify about the alleged events on the two given dates. When he was asked on cross-examination in the General Counsel's case-in-chief, however, whether he had been "specifically warned during day shift time about leaving your machine and disrupting others at work," he denied having received such a warning. He did say, however, that on one occasion, perhaps in January 1981, Piacentini informed him that Vice President Ravis had seen him out of his department and had instructed the superintendent to "tell me to stay on my machine." But when Farris reminded Piacentini that he had sent Farris to the other department, Piacentini decided to let the matter drop, saying, "He told me to write you up, but I'm not going to do it."

Respondent's failure to produce Piacentini, or to explain his absence, as a corroborative witness for Toth, is a decidedly unsettling circumstance. Having given that omission careful consideration, I am nonetheless inclined to credit the testimony of Toth in this area. As noted, Farris showed himself to be an unreliable witness in his description of the February 6 incident, and there is no particular reason to extend him credit with respect to the present matter. Toth seemed a straightforward and consistent witness, and it is difficult for me to believe that his testimony about the two consultations with Piacentini, and his physical participation in drawing up the first warning, was sheer fabrication. I find it equally difficult to conclude that Respondent's references in its mailgrams to "prior warnings" were simply plucked out of the air for the purpose of creating a false predicate for the discharge of Farris. Thus, even if it were true that Piacentini had told Farris that he was not going to give him a warning, as ordered, the information known to Toth on February 9, on which he acted, was that two warnings had been officially issued to Farris.

The evidence as found shows, therefore, that, prior to his February 9 suspension, Farris had received a verbal warning in December and a written warning in January for violating rule 9(h), and his February 6 alleged violation of that rule put him at risk, under the terms of the rule, of "disciplinary action, including discharge." However, while counsel for the General Counsel has not filed a brief in this case, I infer from the evidence he presented that his position is that Farris' conduct on February 6 would not ordinarily have been considered a breach of company rules.

[18] Toth testified that he spoke to Farris in the course of his investigation of Haselhuhn's report. Although Farris gave no hint of such a consultation in his testimony, he was not recalled to testify to the contrary.

Farris testified to a "minimum of four" occasions prior to February 6 on which he had entered the plant during the night shift and engaged in conversations with working employees. Three such instances he recalled specifically. On the first occasion, in September 1980, he entered the plant with his wife, daughter-in-law, and grandchildren, walked around for 30–45 minutes talking to employees, and was not only seen by Haselhuhn but "[i]n fact he walked with us some in the shop." The second time, in December 1980, he spent "over an hour" speaking to night-shift employees and also talked to Haselhuhn. The third visit he remembered was in January 1981, when he entered during the "lunch break" of the night shift, spent 20 minutes, and spoke to some "superiors."

Clayton Cobb testified broadly that, since he started employment in October 1979, he has seen off-duty employees enter the plant, and has done so himself. Further examination, however, showed his experience to be of limited applicability. The one occasion on which he returned to the plant while off duty was during the strike, for the purpose of determining whether it was operating. The only other instances cited by Cobb were his knowledge of a day-shift leader who occasionally came into the office on the night shift to change his clothes, and an employee whose car once broke down outside the plant and who moved in and out of the plant in the course of repairing it. Although he recalled "numerous times" when off-shift employees entered, Cobb could not be specific; he also conceded that it is possible for someone to enter the extremely large plant without being seen by a supervisor.

Haselhuhn testified that he was not aware of any occasions on which nonscheduled employees have entered the plant and engaged other employees in conversation.

The thrust of the evidence given by Farris on this score was, one would suppose, designed to establish inconsistent treatment by Haselhuhn of Farris' nocturnal visits, and thus arouse suspicion about the differing consequences of the February 6 visit. But the other three visits described by Farris, which were assertedly tolerated by Haselhuhn and other superiors, supposedly occurred in September and December 1980 and January 1981, all long after the Union effort began and after Farris had identified himself openly with that campaign. If such visits did in fact take place, and Haselhuhn did not object to them, there is no particular reason to believe that his reaction to the February 6 visit was unlawfully motivated, other than by indulging in speculation as to a late-blooming union animus for which the record provides no support.

It seems rather unlikely to me, moreover, that Farris in the past had been allowed free rein to wander around the plant speaking to employees while they worked. The record contains suggestions that the plant did not run that way. Cobb, as indicated, testified that he walked away from the group on February 6 because "There were already too many people gathered around Mr. Farris." Even Farris' first (and discredited) version of his conversation with Haselhuhn implies subconscious recognition that he was acting against the rules; in describing his response to Haselhuhn's edict that he had to leave, Farris did not say that, with surprise, he reminded Haselhuhn of his prior uncensured off-duty visits (once *cum* family); instead, he portrayed himself as saying to Haselhuhn, "You are right, right. I am leaving."[19]

I find no basis in the record for believing that Farris' February 6 entry was conduct which Respondent might ordinarily tolerate, and I think that it was not unreasonable for Respondent to conclude that, for the third time in 3 months, Farris was "disrupting production" within the meaning of rule 9(h). Accordingly, absent other convincing evidence, there would be no grounds for inferring that Respondent was retaliating against Farris for his prounion bent; in so saying, I have taken into account Farris' uncontradicted testimony regarding his conversations with Piacentini. In a rather troublesome case, the only remaining argument relates to the severity of the penalty.

Although rule 9 provides for the possibility of discharge in the case of a third violation (as did the written warning received by Farris in January), Toth testified that it is not uncommon for employees to be suspended for 3 days rather than discharged, as the next step after receipt of a written warning. The lesser penalty, said Toth, would be imposed in the case of a "moderate violation"; he was not asked to explain why he thought Farris' offense did not fit that category.

It is not the Board's province, however, to second-guess such judgments, except perhaps where Farris' offense might be considered a patently moderate one or where the evidence demonstrated that other employees have received more lenient treatment for conduct no less grave than Farris'. I am unable to say that Toth was acting irrationally in concluding that Farris' third violation was not a "moderate" one, and I have no evidence before me of consideration given by Toth to other employees which tends to show disparate treatment of Farris.[20]

Although I have some reservations about the ultimate disposition of the matter, I feel obliged, for the reasons given above, to conclude that the General Counsel has failed to establish, by a preponderance of the evidence, that the discharge of R. F. Farris in February 1981 violated Section 8(a)(3) and (1) of the Act.

V. THE ALLEGED NO-ACCESS RULE

The remaining issue left unresolved by settlement is found in paragraph 16 of the consolidated complaint, which alleges that since "on or about January 20, 1981, Respondent has promulgated and maintained an unlawfully broad no-access rule which has been posted on its bulletin board and which restricts employees from engaging in activities on behalf of the Charging Union for a reasonable period of time before and after their shift and which prohibits off duty employees from engaging in activities on behalf of the Charging Union in the Re-

[19] Farris conceded on cross-examination that he understood that company policy "prohibited employees from in any way interfering with other employees in their work . . . [o]r disrupting that work."

[20] That no discipline was administered to the employees who gathered around Farris does not strike me as an inexplicable inconsistency.

spondent's parking lot and other exterior areas of the Respondent's facility."

Finding no evidence in the record which supports the foregoing claim, I recommend that the allegation be dismissed.[21]

CONCLUSIONS OF LAW

1. Schreiber Manufacturing Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on or about August 4, 1980, discharging Windle D. Pinkston, Sr., and Dennis J. Brewer, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has committed no unfair labor practices alleged in the complaint except as set out above.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Windle D. Pinkston, Sr., and Dennis J. Brewer on August 4, 1980, I shall recommend that Respondent be required to offer them, if it has not already done so, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits they may have suffered by reason of the discrimination against them, by payment to them of a sum of money equal to that which they normally would have earned from August 5, 1980, to the date of Respondent's offer of reinstatement, less their net earnings for such period. Backpay shall be computed as set out in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977), and see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Schreiber Manufacturing Co., Inc., Clawson, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activity on behalf of Local 299, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, and interfering with the protected concerted activities of employees, by discharging employees engaged in a strike who are qualified for reinstatement.

(b) In any like manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Make Windle D. Pinkston, Sr., and Dennis J. Brewer whole for any loss of earnings and benefits they may have suffered by reason of Respondent's unlawful discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Offer Windle D. Pinkston, Sr., and Dennis J. Brewer, if it has not already done so, immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, and employees hired as replacements, and make them whole for any loss of pay they may have suffered by reason of Respondent's refusal to reinstate them, by payment to each of them a sum of money equal to what the employee would have earned from August 5, 1980, to the date of Respondent's offer of reinstatement, in the manner set forth in this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this recommended Order.

(d) Post at its Clawson, Michigan, plant copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to

[21] On brief, Respondent renews at length a motion to dismiss which was denied by me at the hearing. It is Respondent's contention that, under Board regulations, the service of unfair labor practice charges upon respondents must be accomplished by charging parties, and that the timely service of copies of such charges by Regional Offices does not suffice. Having reconsidered Respondent's argument, I reaffirm my ruling, for the reasons given at the hearing. I have little doubt that, for many years, the Board has contemplated that the service of charges by Regional Offices satisfies the 10(b) requirement of service upon the charged party, and, until the Board says that its regulations mean otherwise, I shall continue to indulge that assumption.

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed except insofar as specific findings of violations based upon the allegations of the complaint have been made above.